

Real Estate Disclosure Statute

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About The Faculty

DAN GREENBERG has been an Illinois Real Estate Lawyers Association (IRELA) board member for many years, spending many hours participating in the 4.0 and 5.0 contract drafting committees and other endeavors to improve the practice of real estate. This past February, he presented a CLE seminar for IRELA on the Illinois Real Property Disclosure Act. In preparing for that presentation, Dan noticed some shortcomings and confusing provisions in the Act. After his IRELA presentation, he received numerous further inquiries from other practitioners pointing to the need for additional revisions to the Act. To attempt to clarify confusing provisions in the Act, to remedy some of its shortcomings, and to appropriately update that act commensurate with current real estate practice, he volunteered to chair an IRELA committee to draft amendments to the Disclosure Act. That committee, consisting of members Marc Blumenthal, Karen Patterson, Michael Rooney, Colleen Sahlas, with occasional input, inspiration, and direction from John O'Brien, has already spent many hours reviewing and discussing relevant act provisions.

Dan has been a real estate practitioner in the south suburbs for 40 years. Shortly after opening his own firm in 1981, inflation and mortgage rates escalated to all time highs, requiring him to quickly learn real estate in the trenches, including more unusual transactions such as rent with option to buy, assumptions, and Articles of Agreement. Dan recently turned over his real estate sole practice to his daughter, Stephanie, and her law partner, Michelle Sinkovits, and is now of counsel to their firm, Greenberg & Sinkovits, LLC, in Homewood. He is enjoying watching the next generation step up and move the practice of real estate law into the future. Dan has always enjoyed helping fellow attorneys with real estate issues they encounter in their practices, firmly believing that doing so leads to professional friendships and elevates the practice of real estate.

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ILLINOIS REAL PROPERTY DISCLOSURE ACT - IICLE - 9/9/21

1. Introduction.
2. Background to my involvement with the Illinois Real Property Disclosure Act:
 - a. Practicing in the south suburbs for 40 years and semi-retired last October, with my daughter and her law partner taking over my real estate practice.
 - b. During my practice, I looked at the Act occasionally to be familiar with it.
 - c. Over the years, I encountered some issues, mainly:
 - i. With other attorneys and Realtors® about when disclosure is required;
 - ii. With Realtors® over how to properly complete the disclosure – such as when the first statement is answered “no” and no others are answered;
 - iii. Occasionally with clients wanting to know if they need to disclose something specific.
 - d. IRELA asked me to do a CLE seminar on the Disclosure Act, which I did this past February, and is available on demand through both IICLE and IRELA. While that presentation focused on what you need to know about the Act in your every day practice, this presentation will focus on some areas of the Act in need of review and potential revision, and a committee I have been chairing to accomplish that.
 - i. Presenting on the Disclosure Act, which I thought I was relatively familiar with from my every day practice, turned out to be an amazing learning experience. I had to review provisions multiple times until I really understood them. I had to correct some initial mis-impressions and misunderstandings. I had to reconcile sections that I initially thought conflicted with one another. In that process, it became evident that, although the Act was well drafted in so many ways, certain provisions were not clear, or created confusion among real estate practitioners.
 - ii. Received lots of email questions afterward, exposing additional parts of the Act in need of updating and clarification. That is what lead to the creation of an IRELA committee to amend the Disclosure Act.
3. Before discussing some of the Act’s shortcomings, a brief overview of the Act:
 - a. It applies only to **residential** real property of 1, 2, 3, or 4 dwelling units.
 - b. Every seller is required to provide the disclosure statement **prior** to contracting with a buyer unless:
 - i. The transfer is exempt under Section 15 (transfers pursuant to court order, foreclosure, by a fiduciary, among co-owners or in the lineal line of consanguinity, pursuant to testate or intestate succession, from a relocation or governmental entity, or new construction that has not been occupied), or
 - ii. The seller is excepted from the definition of a seller under Section 5.

- c. The seller only has to disclose material defects of which the seller has “actual knowledge,” does not have to make any specific investigation, and is not liable for any inaccuracy of which the Seller was unaware, or need to disclose anything which the seller reasonably believes was previously corrected. (Section 25).
 - d. The seller’s disclosures are not warranties. (Section 35).
 - e. “Material defect” is defined in the disclosure statement as a defect substantially adversely affecting the value of the property or significantly impairing health or safety, and all 23 statements are to be answered. (Sections 20 and 35).
 - f. Up to closing, the Seller is obligated to supplement the prior disclosure statement if anything was stated in error, was omitted, or is inaccurate. (Section 30).
 - g. If a Seller provides the disclosure statement *after* contracting, and the disclosure reveals a material defect, the buyer has the option to terminate the contract for up to 3 business days (and if the disclosure is never given, the buyer may terminate up to closing). However, the buyer has no right to terminate for newly occurring material defects disclosed in a supplement. (Sections 40 and 55).
 - h. The Act does not limit any common law remedies. (Section 50).
 - i. The Act provides penalties for anyone knowingly violating the Act or knowingly disclosing falsely, of actual damages, costs, and potentially attorney fees. (Section 55).
 - j. The Act has a one year Statute of Limitations. (Section 60).
4. Areas where the Act is outdated:
- a. Delivery of the disclosure statement to a prospective buyer is only by personal delivery, by fax, or overnight delivery (including Airborne). Email not specified – was not even in use in 1994. How are disclosures given today?
 - b. While transactions pursuant to testate or intestate succession were exempt from the Act, there is no provision regarding TODI’s, which came into existence way after the Act.
5. Areas of confusion in the Act itself, or in practitioners’ comprehension thereof:
- a. Transfers pursuant to testate/intestate succession - which transfer? Long ISBA Real Estate Section listerv discussion.
 - b. Definition of “seller” – every person/entity with a legal or equitable interest in residential real property – owner, trust beneficiary, contract purchaser, or lessee of a ground lease. But, confusing exclusion from definition of a “seller” – two prong test:
 - i. **never occupied** the residential real property **and**
 - ii. **never had nor delegated** management authority.
 - (1) Who ever gets excluded under second prong?
 - (2) Example – 3 kids – heirs at law of mom or dad, one is in charge.
 - c. If a transfer is exempt under the Act, but the seller meets the definition of “seller,” does the seller nevertheless have to comply with the Act?
 - d. Rehabbers claiming “new construction” exclusion from the Act for newly constructed, never occupied property - Section 15(9). Why would the legislature exempt new construction and not rehabs?
 - e. If a transaction is excluded but the seller nevertheless provides a disclosure statement, is that seller then subject to the Act? Did that seller waive the exclusion?

- f. Long definition in multiple sections of the Act as to providing the disclosure before the buyer is contractually obligated: "... before the signing of a written agreement by the seller and prospective buyer that would, subject to the satisfaction of any negotiated contingencies, require the prospective buyer to accept a transfer of the residential real property."
 - g. Section 20 says seller "shall" deliver disclosure **prior** to contracting, but Section 40 discusses if it is delivered **after** contracting.
 - h. Many sentences with varying concepts are lumped into a single paragraph – much more easily understood if separated into subparagraphs.
6. Areas where court cases created issues:
- a. *Hawkins v. Voss*, 29 N.E.3d 1233 (Ill. App. 2015) – A seller who is the trustee and beneficiary of his/her own revocable trust is exempt from the Real Property Disclosure Act, under section 15, as a fiduciary in the course of administration of a trust. The court's rationale was that the trustee still owed duties to contingent beneficiaries and was, therefore, exempted as fiduciary. However, see Sherwin Abrams article on that case, in the ISBA Trust and Estates newsletter of April, 2021, concluding that the new Illinois Trust Code has gutted the entire rationale of that case and that the legislature has effectively overruled it. The Illinois Trust Code basically provides that if a settlor-trustee personally has the capacity to revoke his/her living trust, the trustee owes no fiduciary duties to contingent beneficiaries. Accordingly, a settlor-trustee of their own living trust is no longer exempted from the Disclosure Act.
 - b. *Butler v. Harris*, 13 N.E.3d 380 (Ill. App. 2014) – suggests that the standard of proof in Disclosure Act violation cases is clear and convincing evidence, rather than the preponderance of the evidence.
 - c. *Fox v. Heimann*, 872 N.E.2d 126, 375 Ill.App.3d 35 (Ill. App. 2007) – Major house settlement 4 months after closing. The court stated that the Disclosure Act was deemed part of the contract, as existing law is incorporated into the contract. In a breach of contract claim (not a Disclosure Act claim as the one year statute passed before suit was filed) the court noted, but did not find it germane to answer, the question of whether a violation of the Disclosure Act could be brought as a breach of contract action, under a 10 year statute of limitations.
 - d. General reluctance by judges to award attorney fees. The Act provides that "the court may award reasonable attorney fees incurred by the prevailing party." However, the eternal question of what constitutes the "prevailing party" remains. Moreover, while the Act was to provide additional recourse to protect buyers from being unfairly stuck with unexpected expenses, from a practical standpoint, judges do not want to encourage cases over attorneys fees, rather than the substantive issues – e.g., damages of \$750, but buyer incurred attorney fees of \$10,000.00.
7. Unfortunately, legislative history for this Act is pretty much non-existent, with the exceptions of minimal remarks made in the 88th General Assembly Transcription of Debate, on 4/16/93. The main gist of those remarks were by Representative Novak, from Kankakee, stating: "...an initiative of the Illinois Association of Realtors...It's simple. When people go out to buy a home, this is gonna be their ...the most major investment they will make in their lives. They want to make sure that what they purchase is of sound basic construction, a safe place to live, because they are gonna be paying on it for quite a long time."

8. The IRELA committee reviewing the Act has had to “read between the lines” to attempt to ascertain the original legislative intent behind a number of provisions. The committee also needs to be conscious of the reality that if controversial changes are made to the existing Act, various interest groups could oppose the legislation. We need to remember that while touted as an Act to protect buyers, the Illinois Association of Realtors introduced this legislation, not so much to protect buyers, but to protect their members from being dragged into litigation, under common law theories such as fraud, deceit, and fraudulent concealment.
9. Therefore, our goal has been to keep amendments very much in line with the original intent of the Act, so as not to jeopardize accomplishing necessary clarifications and updates to the Act. This process still has a good way to go, as we will need a legislative sponsor, to have this reviewed by whatever committees, and to hopefully be approved by the legislature, and signed by the governor. Watch for this legislation as it progresses next year to bring needed changes to the Act. Many thanks to IRELA, John O’Brien, the entire committee, and contributing litigators.
10. By clarifying certain provisions we also hope to alleviate practitioners feeling the need to propose so many attorney review changes which are really unnecessary.
11. Act related considerations for attorney review:
 - a. If no Disclosure Report has been provided, require the seller to provide it unless the seller is exempt.
 - b. Make sure Disclosure Report has all current provisions, in compliance with the Act.
 - c. Check that disclosure form is completed properly on its face. Any item (except #1) answered “No” or “N/A” needs to be explained in explanation section.
 - d. Strike Disclosure Report (and Radon Disclosure) if you represent an exempt seller.
 - e. If #1 states “No” (seller did not occupy last 12 months), consider tax exemption issues – is the Seller entitled to claim the exemptions showing on the last tax bill?
 - f. May want to add that if seller provides a supplemental disclosure noting a material defect, buyer shall have the option to terminate the contract or to accept seller’s payment of the cost to correct the defect. But is this perhaps not needed? (See highlighted 7.0 contract provisions).
12. Duplicative/unnecessary attorney review changes – examples:
 - a. “Flood Plain: Seller represents to Buyer that the subject real estate is not located within a flood plain.” (Watch for added “warrant” language). OR “Please confirm that the property is not located in a flood zone.” Disclosure Report #3 already covers this change.
 - b. “Seller represents that Seller knows of no outstanding city violations.” Disclosure Report #22 (and 7.0 contract line 288) already covers this change.
 - c. The disclosures contained in the Illinois Real Property Disclosure Report (the Disclosure Report) shall be deemed made as of the acceptance date, and shall be remade as of the date of closing. By way of clarification, the Seller shall inform the Buyer of any change in the condition of the Property (or any aspect thereof) which would cause any of the Seller’s disclosures made in the Disclosure Report, to be untrue as of the date of closing. Act Section 30 already covers this change.



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PROPERTY

(765 ILCS 77/) Residential Real Property Disclosure Act.

(765 ILCS 77/Art. 1 heading)

ARTICLE 1

SHORT TITLE

(Source: P.A. 94-280, eff. 1-1-06.)

(765 ILCS 77/1)

Sec. 1. Short title. This Act may be cited as the Residential Real Property Disclosure Act.

(Source: P.A. 88-111.)

(765 ILCS 77/Art. 2 heading)

ARTICLE 2

DISCLOSURES

(Source: P.A. 94-280, eff. 1-1-06.)

(765 ILCS 77/5)

Sec. 5. Definitions. As used in this Act, unless the context otherwise requires, the following terms have the meaning given in this Section.

"Residential real property" means real property improved with not less than one nor more than 4 residential dwelling units; units in residential cooperatives; or, condominium units, including the limited common elements allocated to the exclusive use thereof that form an integral part of the condominium unit. The term includes a manufactured home as defined in subdivision (53) of Section 9-102 of the Uniform Commercial Code that is real property as defined in the Conveyance and Encumbrance of Manufactured Homes as Real Property and Severance Act.

"Seller" means every person or entity who is an owner, beneficiary of a trust, contract purchaser or lessee of a ground lease, who has an interest (legal or equitable) in residential real property. However, "seller" shall not include any person who has both (i) never occupied the residential real property

and (ii) never had the management responsibility for the residential real property nor delegated such responsibility for the residential real property to another person or entity.

"Prospective buyer" means any person or entity negotiating or offering to become an owner or lessee of residential real property by means of a transfer for value to which this Act applies.

(Source: P.A. 98-749, eff. 7-16-14; 99-78, eff. 7-20-15.)

(765 ILCS 77/10)

Sec. 10. Except as provided in Section 15, this Act applies to any transfer by sale, exchange, installment land sale contract, assignment of beneficial interest, lease with an option to purchase, ground lease, or assignment of ground lease of residential real property.

(Source: P.A. 88-111.)

(765 ILCS 77/15)

Sec. 15. The provisions of this Act do not apply to the following:

(1) Transfers pursuant to court order, including, but not limited to, transfers ordered by a probate court in administration of an estate, transfers between spouses resulting from a judgment of dissolution of marriage or legal separation, transfers pursuant to an order of possession, transfers by a trustee in bankruptcy, transfers by eminent domain, and transfers resulting from a decree for specific performance.

(2) Transfers from a mortgagor to a mortgagee by deed in lieu of foreclosure or consent judgment, transfer by judicial deed issued pursuant to a foreclosure sale to the successful bidder or the assignee of a certificate of sale, transfer by a collateral assignment of a beneficial interest of a land trust, or a transfer by a mortgagee or a successor in interest to the mortgagee's secured position or a beneficiary under a deed in trust who has acquired the real property by deed in lieu of foreclosure, consent judgment or judicial deed issued pursuant to a foreclosure sale.

(3) Transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust.

(4) Transfers from one co-owner to one or more other co-owners.

(5) Transfers pursuant to testate or intestate succession.

(6) Transfers made to a spouse, or to a person or persons in the lineal line of consanguinity of one or more of the sellers.

(7) Transfers from an entity that has taken title to residential real property from a seller for the purpose of assisting in the relocation of the seller, so long as the entity makes available to all prospective buyers a copy of the disclosure form furnished to the entity by the seller.

(8) Transfers to or from any governmental entity.

(9) Transfers of newly constructed residential real property that has not been occupied.

(Source: P.A. 88-111.)

(765 ILCS 77/20)

Sec. 20. A seller of residential real property shall complete all applicable items in the disclosure document described in Section 35 of this Act. The seller shall deliver to the prospective buyer the written disclosure statement required by this Act before the signing of a written agreement by the seller and prospective buyer that would, subject to the satisfaction of any negotiated contingencies, require the prospective buyer to accept a transfer of the residential real

property.

(Source: P.A. 88-111.)

(765 ILCS 77/25)

Sec. 25. Liability of seller.

(a) The seller is not liable for any error, inaccuracy, or omission of any information delivered pursuant to this Act if (i) the seller had no knowledge of the error, inaccuracy, or omission, (ii) the error, inaccuracy, or omission was based on a reasonable belief that a material defect or other matter not disclosed had been corrected, or (iii) the error, inaccuracy, or omission was based on information provided by a public agency or by a licensed engineer, land surveyor, structural pest control operator, or by a contractor about matters within the scope of the contractor's occupation and the seller had no knowledge of the error, inaccuracy, or omission.

(b) The seller shall disclose material defects of which the seller has actual knowledge.

(c) The seller is not obligated by this Act to make any specific investigation or inquiry in an effort to complete the disclosure statement.

(Source: P.A. 90-383, eff. 1-1-98.)

(765 ILCS 77/30)

Sec. 30. Disclosure supplement. If, prior to closing, any seller has actual knowledge of an error, inaccuracy, or omission in any prior disclosure document after delivery of that disclosure document to a prospective buyer, that seller shall supplement the prior disclosure document with a written supplemental disclosure.

(Source: P.A. 90-383, eff. 1-1-98; 91-357, eff. 7-29-99.)

(765 ILCS 77/35)

Sec. 35. Disclosure report form. The disclosures required of a seller by this Act shall be made in the following form:

RESIDENTIAL REAL PROPERTY DISCLOSURE REPORT

NOTICE: THE PURPOSE OF THIS REPORT IS TO PROVIDE PROSPECTIVE BUYERS WITH INFORMATION ABOUT MATERIAL DEFECTS IN THE RESIDENTIAL REAL PROPERTY. THIS REPORT DOES NOT LIMIT THE PARTIES' RIGHT TO CONTRACT FOR THE SALE OF RESIDENTIAL REAL PROPERTY IN "AS IS" CONDITION. UNDER COMMON LAW, SELLERS WHO DISCLOSE MATERIAL DEFECTS MAY BE UNDER A CONTINUING OBLIGATION TO ADVISE THE PROSPECTIVE BUYERS ABOUT THE CONDITION OF THE RESIDENTIAL REAL PROPERTY EVEN AFTER THE REPORT IS DELIVERED TO THE PROSPECTIVE BUYER. COMPLETION OF THIS REPORT BY THE SELLER CREATES LEGAL OBLIGATIONS ON THE SELLER; THEREFORE THE SELLER MAY WISH TO CONSULT AN ATTORNEY PRIOR TO COMPLETION OF THIS REPORT.

Property Address:

City, State & Zip Code:

Seller's Name:

This Report is a disclosure of certain conditions of the residential real property listed above in compliance with the Residential Real Property Disclosure Act. This information is provided as of ...(month) ...(day) ...(year), and does not reflect any changes made or occurring after that date or information that becomes known to the seller after that date. The disclosures herein shall not be deemed warranties of any kind by the seller or any person representing any party in this transaction.

In this form, "am aware" means to have actual notice or actual knowledge without any specific investigation or inquiry. In this form, "material defect" means a condition that would have a substantial adverse effect on the value of the

residential real property or that would significantly impair the health or safety of future occupants of the residential real property unless the seller reasonably believes that the condition has been corrected.

The seller discloses the following information with the knowledge that even though the statements herein are not deemed to be warranties, prospective buyers may choose to rely on this information in deciding whether or not and on what terms to purchase the residential real property.

The seller represents that to the best of his or her actual knowledge, the following statements have been accurately noted as "yes" (correct), "no" (incorrect), or "not applicable" to the property being sold. If the seller indicates that the response to any statement, except number 1, is yes or not applicable, the seller shall provide an explanation, in the additional information area of this form.

- | | YES | NO | N/A | |
|----------|-------|-------|-------|---|
| 1. | | | | Seller has occupied the property within the last 12 months.
(No explanation is needed.) |
| 2. | | | | I am aware of flooding or recurring leakage problems in the crawl space or basement. |
| 3. | | | | I am aware that the property is located in a flood plain or that I currently have flood hazard insurance on the property. |
| 4. | | | | I am aware of material defects in the basement or foundation (including cracks and bulges). |
| 5. | | | | I am aware of leaks or material defects in the roof, ceilings, or chimney. |
| 6. | | | | I am aware of material defects in the walls, windows, doors, or floors. |
| 7. | | | | I am aware of material defects in the electrical system. |
| 8. | | | | I am aware of material defects in the plumbing system (includes such things as water heater, sump pump, water treatment system, sprinkler system, and swimming pool). |
| 9. | | | | I am aware of material defects in the well or well equipment. |
| 10. | | | | I am aware of unsafe conditions in the drinking water. |
| 11. | | | | I am aware of material defects in the heating, air conditioning, or ventilating systems. |
| 12. | | | | I am aware of material defects in the fireplace or woodburning stove. |
| 13. | | | | I am aware of material defects in the septic, sanitary sewer, or other disposal system. |
| 14. | | | | I am aware of unsafe concentrations of radon on the premises. |
| 15. | | | | I am aware of unsafe concentrations |

- of or unsafe conditions relating to asbestos on the premises.
16. I am aware of unsafe concentrations of or unsafe conditions relating to lead paint, lead water pipes, lead plumbing pipes or lead in the soil on the premises.
17. I am aware of mine subsidence, underground pits, settlement, sliding, upheaval, or other earth stability defects on the premises.
18. I am aware of current infestations of termites or other wood boring insects.
19. I am aware of a structural defect caused by previous infestations of termites or other wood boring insects.
20. I am aware of underground fuel storage tanks on the property.
21. I am aware of boundary or lot line disputes.
22. I have received notice of violation of local, state or federal laws or regulations relating to this property, which violation has not been corrected.
23. I am aware that this property has been used for the manufacture of methamphetamine as defined in Section 10 of the Methamphetamine Control and Community Protection Act.

Note: These disclosures are not intended to cover the common elements of a condominium, but only the actual residential real property including limited common elements allocated to the exclusive use thereof that form an integral part of the condominium unit.

Note: These disclosures are intended to reflect the current condition of the premises and do not include previous problems, if any, that the seller reasonably believes have been corrected.

If any of the above are marked "not applicable" or "yes", please explain here or use additional pages, if necessary:

.....
.....
.....

Check here if additional pages used:

Seller certifies that seller has prepared this statement and certifies that the information provided is based on the actual notice or actual knowledge of the seller without any specific investigation or inquiry on the part of the seller. The seller hereby authorizes any person representing any principal in this transaction to provide a copy of this report, and to disclose any information in the report, to any person in connection with any actual or anticipated sale of the property.

Seller: Date:

Seller: Date:

THE PROSPECTIVE BUYER IS AWARE THAT THE PARTIES MAY CHOOSE

TO NEGOTIATE AN AGREEMENT FOR THE SALE OF THE PROPERTY SUBJECT TO ANY OR ALL MATERIAL DEFECTS DISCLOSED IN THIS REPORT ("AS IS"). THIS DISCLOSURE IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THAT THE PROSPECTIVE BUYER OR SELLER MAY WISH TO OBTAIN OR NEGOTIATE. THE FACT THAT THE SELLER IS NOT AWARE OF A PARTICULAR CONDITION OR PROBLEM IS NO GUARANTEE THAT IT DOES NOT EXIST. THE PROSPECTIVE BUYER IS AWARE THAT HE MAY REQUEST AN INSPECTION OF THE PREMISES PERFORMED BY A QUALIFIED PROFESSIONAL.

Prospective Buyer: Date: Time:

Prospective Buyer: Date: Time:

(Source: P.A. 98-754, eff. 1-1-15.)

(765 ILCS 77/40)

Sec. 40. Material defect. If a material defect is disclosed in the Residential Real Property Disclosure Report, after acceptance by the prospective buyer of an offer or counter-offer made by a seller or after the execution of an offer made by a prospective buyer that is accepted by the seller for the conveyance of the residential real property, then the prospective buyer may, within 3 business days after receipt of that report by the prospective buyer, terminate the contract or other agreement without any liability or recourse except for the return to prospective buyer of all earnest money deposits or down payments paid by prospective buyer in the transaction. If a material defect is disclosed in a supplement to this disclosure document, the prospective buyer shall not have a right to terminate unless the material defect results from an error, inaccuracy, or omission of which the seller had actual knowledge at the time the prior disclosure document was completed and signed by the seller. The right to terminate the contract, however, shall no longer exist after the conveyance of the residential real property. For purposes of this Act the termination shall be deemed to be made when written notice of termination is personally delivered to at least one of the sellers identified in the contract or other agreement or when deposited, certified or registered mail, with the United States Postal Service, addressed to one of the sellers at the address indicated in the contract or agreement, or, if there is not an address contained therein, then at the address indicated for the residential real property on the report.

(Source: P.A. 90-383, eff. 1-1-98.)

(765 ILCS 77/45)

Sec. 45. This Act is not intended to limit or modify any obligation to disclose created by any other statute or that may exist in common law in order to avoid fraud, misrepresentation, or deceit in the transaction.

(Source: P.A. 88-111.)

(765 ILCS 77/50)

Sec. 50. Delivery of the Residential Real Property Disclosure Report provided by this Act shall be by:

(1) personal or facsimile delivery to the prospective buyer;

(2) depositing the report with the United States Postal Service, postage prepaid, first class mail, addressed to the prospective buyer at the address provided by the prospective buyer or indicated on the contract or other agreement; or

(3) depositing the report with an alternative delivery service such as Federal Express, UPS, or Airborne, delivery charges prepaid, addressed to the prospective

buyer at the address provided by the prospective buyer or indicated on the contract or other agreement.

For purposes of this Act, delivery to one prospective buyer is deemed delivery to all prospective buyers. Delivery to an authorized individual acting on behalf of a prospective buyer constitutes delivery to all prospective buyers. Delivery of the report is effective upon receipt by the prospective buyer. Receipt may be acknowledged on the report, acknowledged in an agreement for the conveyance of the residential real property, or shown in any other verifiable manner.
(Source: P.A. 91-357, eff. 7-29-99.)

(765 ILCS 77/55)

Sec. 55. Violations and damages. If the seller fails or refuses to provide the disclosure document prior to the conveyance of the residential real property, the buyer shall have the right to terminate the contract. A person who knowingly violates or fails to perform any duty prescribed by any provision of this Act or who discloses any information on the Residential Real Property Disclosure Report that he knows to be false shall be liable in the amount of actual damages and court costs, and the court may award reasonable attorney fees incurred by the prevailing party.
(Source: P.A. 90-383, eff. 1-1-98.)

(765 ILCS 77/60)

Sec. 60. No action for violation of this Act may be commenced later than one year from the earlier of the date of possession, date of occupancy, or date of recording of an instrument of conveyance of the residential real property.
(Source: P.A. 88-111.)

(765 ILCS 77/65)

Sec. 65. A copy of this Act, excluding Section 35, must be printed on or as a part of the Residential Real Property Disclosure Report form.
(Source: P.A. 88-111.)

Trusts & Estates

The newsletter of the Illinois State Bar Association's Section on Trusts & Estates

Transfer on Death Instruments: Pitfalls and Pending Legislation

BY MICHAEL J. FLECK

Introduction

Illinois introduced transfer on death instruments (TODIs) for the transfer of residential real estate in 2012.¹ While TODIs have utility in providing ease of transferring residential real property, they do have shortcomings of which the practitioner should be aware in evaluating use of TODIs and whether it is the best

fit for the client. This article will give a brief overview of the Transfer on Death Instrument Act. It will then consider its benefits and some potential shortcomings, and finally will discuss pending legislation that could significantly address some of these shortcomings to allow broader use for the practitioner.

Continued on next page

Residential Real Property Disclosure Act & the Illinois Trust Code: Has the ITC Repealed *Hawkins v. Voss*?

BY SHERWIN D. ABRAMS

Recent discussions in the ISBA's Real Estate Law Community concerning exemptions from the disclosures required by the Residential Real Property Disclosure Act¹, especially the exemption for fiduciaries, reminds us of *Hawkins v. Voss*.²

Ms. Hawkins hired Voss Brothers Action Auction Associates³ to auction off

her house. Ms. Hawkins had previously conveyed her house to her revocable living trust. She was the sole beneficiary of the trust during her lifetime; she had the power to withdraw property from the trust; she had the power to revoke the trust. Her

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its revocation. For creditors, “a beneficiary of a transfer on death instrument is subject to creditor, administrative, funeral and burial, and statutory claims to the same extent and in the same manner as a beneficiary of a trust that was revocable at the time of the settlor’s death as provided in Section 505 of the Illinois Trust Code, except that if more than one real property is transferred by a transfer on death instrument, the liability will be apportioned among the real properties in proportion to the net values of the real properties at the time of the owner’s death.”²⁵

Conclusion

TODIs have their place as a tool for the transfer of real estate. The proposed changes in S.B. 47 makes this a more useful tool, but the practitioner should be aware of and advise the client of the shortcomings of their use (in its current form or under the proposed changes), including privacy issues,

creditor and spousal claims, and hidden costs in subsequent transfers. For those who are not comfortable with land trusts or revocable trusts and still want to avoid the probate process, TODIs do provide an alternative. ■

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1. P.A. 97-555, eff. 1/1/2012.
2. See Illinois Residential Real Property Transfer on Death Instrument Act generally, 755 ILCS 27/1 *et seq.*, and specifically 755 ILCS 27/20.
3. 755 ILCS 27/5.
4. 755 ILCS 27/30.
5. 755 ILCS 27/35.
6. *Id.*
7. 755 ILCS 27/5.
8. 755 ILCS 27/25.
9. 755 ILCS 27/65(a)(1).
10. See 755 ILCS 5/20 for the requirements regarding the probate of real estate. While there are some methods for avoiding this requirement through title insurance procedures such as a bond in lieu of probate, this is the general method for dealing with real estate in Illinois.
11. 755 ILCS 27/40(a)(3).

12. 755 ILCS 27/85.
13. 755 ILCS 5/18-12(b) (“...all claims which could have been barred under this Section are, in any event, barred 2 years after decedent’s death, whether or not letters of office are issued upon the estate of the decedent.”). This claims period can be shortened to 6 months under formal probate.
14. 102d Ill. Gen. Assem., Senate Bill 47, 2021 Sess. 755 ILCS 27/1 is amended on page 1.
15. 102d Ill. Gen. Assem., Senate Bill 47, 2021 Sess. 755 ILCS 27/5 is amended on page 2.
16. *Id.*
17. 102d Ill. Gen. Assem., Senate Bill 47, 2021 Sess., *passim*.
18. 102d Ill. Gen. Assem., Senate Bill 47, 2021 Sess. 755 ILCS 27/21 is added on pages 4-5.
19. 102d Ill. Gen. Assem., Senate Bill 47, 2021 Sess. 755 ILCS 27/30 is amended on page 5.
20. 102d Ill. Gen. Assem., Senate Bill 47, 2021 Sess. 755 ILCS 27/40 is amended on page 6.
21. 102d Ill. Gen. Assem., Senate Bill 47, 2021 Sess. 755 ILCS 27/45 is amended on pages 7-8. This is similar to language in the Probate Act concerning the witnessing of a will. See 755 ILCS 5/4-6.
22. 102d Ill. Gen. Assem., Senate Bill 47, 2021 Sess. 755 ILCS 27/45 is amended on page 8. Likewise, this is similar to language in the Probate Act concerning the witnessing of a will. See 755 ILCS 5/4-6.
23. 102d Ill. Gen. Assem., Senate Bill 47, 2021 Sess. 755 ILCS 27/65 is amended on pages 10-15.
24. 102d Ill. Gen. Assem., Senate Bill 47, 2021 Sess. 755 ILCS 27/66 is added on page 15. Probate Act renunciation language can be found at 755 ILCS 5/2-8.
25. 102d Ill. Gen. Assem., Senate Bill 47, 2021 Sess. 755 ILCS 27/85 is amended on page 15.

Residential Real Property Disclosure Act & the Illinois Trust Code: Has the ITC Repealed *Hawkins v. Voss*?

CONTINUED FROM PAGE 1

children were the contingent remainder beneficiaries. The trust was, in essence, a will substitute.

It’s unclear whether Ms. Hawkins hired the auctioneers in her capacity as trustee or individually; there was no written agreement between Ms. Hawkins and the auctioneers. The auctioneers allegedly agreed to provide all documentation needed to consummate a sale.

The auction produced a buyer for the house, and it appears that a purchase and sale agreement was signed. The court does not tell us whether Ms. Hawkins signed as trustee or in her individual capacity. Regardless, the buyers were not given the disclosures referred to in the Act.

The buyers used the seller’s failure to provide the disclosures as an excuse to back out of the deal. There is no suggestion that Ms. Hawkins contested the buyers’ right to

cancel. Instead, she sued the auctioneers! She faulted the auctioneers for failing to provide the statutory disclosures. Unfortunately for Ms. Hawkins, and for Illinois jurisprudence, the auctioneers were ably represented by frequent contributors to our Communities.⁴ Perhaps they can fill in some of the facts that the court omits, especially whether Ms. Hawkins signed the PSA in her individual name or as trustee. Had she signed in her individual capacity, she surely would have been subject to the Act. She made it clear in her lawsuit though that she was suing “Not in Her Individual Capacity but as the Trustee of the Kathleen T. Hawkins Trust”.

The court held that the auctioneers were not at fault for failing to provide the disclosures because no disclosures were required. The transaction was exempt from the Act, so the court held, by virtue of section 15 of the Act⁵ which provides:

The provisions of this Act do not apply to the following:

- (3) Transfers by a fiduciary in the course of the administration of a decedent’s estate, guardianship, conservatorship, or trust.

The court held that the proposed transfer was by a fiduciary in the course of the administration of a trust and therefore exempt. Ms. Hawkins argued that although she was a trustee, she was not a fiduciary and that she was subject to the Act. Ironical, is it not, that a seller who failed to provide the disclosures argues that she should have?

The court cited several cases and statutes that refer to a trustee as a fiduciary. The court quoted the definition of fiduciary from an older edition of Black’s Law Dictionary:

A relationship in which one person is under a duty to act for the benefit of another on matters

within the scope of the relationship. Fiduciary relationships—such as trustee-beneficiary * *—require an unusually high degree of care.” Black’s Law Dictionary 1315 (8th ed. 2004).⁶

The court concluded that Ms. Hawkins was a fiduciary because as trustee she owed a fiduciary duty to the contingent beneficiaries of her trust. It did not matter that the children were only contingent rather than vested beneficiaries. It did not matter that Ms. Hawkins could revoke the trust. Until she did revoke it, the court held that she owed the children a fiduciary duty.

The court did not attempt to explain exactly what the trustee’s fiduciary duty to the children entailed. The court did not explain how the trustee was supposed to act for the benefit of her children. Did she owe them a duty of care so that she would be liable if she negligently managed trust assets? Did she owe the children the “punctilio of an honor the most sensitive”⁷ so that if the trust property included a hotel with shops and offices, she could not buy the competing hotel next door without first offering it to herself as trustee? Did she owe the children a duty of good faith and fair dealing that might

restrict her from withdrawing property from the trust or revoking it entirely? The court does not tell us. The court tells us only that the trustee of a self-settled revocable trust owes a fiduciary duty to those who have a contingent remainder interest. A dubious decision at best; nevertheless, it became the law.

But is it still the law? Is *Hawkins v. Voss* still good law, or has it been overruled by the Illinois Trust Code?⁸ We think it has because its rationale has been undercut by section 603(b) of the ITC which provides:

(b) To the extent a trust is revocable by a settlor, and the settlor personally has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

That’s a long-winded way of saying that when the settlor and the trustee are the same and competent, the trustee of a revocable trust owes no duty to anyone else. Had the ITC been in effect when the buyers reneged, Ms. Hawkins would not have owed a duty to her children; she would not have been a fiduciary; she would have been subject to the Disclosure Act; and she would have had

a viable claim against the auctioneers for failing to provide the disclosures. If indeed they had promised to do so.

Practice Pointers

If you represent a buyer, require the disclosures as a condition of the PSA, even if the transaction might be exempt. If you represent a seller in an exempt transaction, the decision whether to provide disclosures is more difficult. On the one hand, why make a representation concerning the condition of the property when it’s not required? On the other hand, a seller can be guilty of fraud for omitting to reveal known but not easily detectable defects. Do not rely on *Hawkins v. Voss* to claim that a transaction is exempt. ■

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1. 765 ILCS 77/
2. 2015 IL App (5th) 140001
3. Say “Action Auction Associates” quickly five times.
4. Stumpf & Gutknecht, P.C.
5. 765 ILCS 77/15
6. 2015 IL App (5th) 140001 at ¶37
7. *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928)
8. 760 ILCS 3/

Law Firm Succession/Exit Strategies: Succession & Transition Plan

BY JOHN W. OLMSTEAD

A case study of a nine-attorney law firm whose three founders wanted to retire and needed a succession and transition plan.

The Law Firm of Bigger Better & Best (Fictitious Names Used)

Paul Bigger and George Better graduated in the top of their law school class and upon graduation joined the same large law firm in Chicago. Both worked in the firm’s prestigious litigation department and performed the typical discovery support work that associates do in large law firms. Initially document reviews later graduating

to preparation of pleadings and taking of depositions. After ten years with the firm the two attorneys, now non-equity partners, were now trying cases, bringing in clients, and controlling small books of business. The firm recently announced a freeze on admitting new equity partners. Paul and George had worked together on some large cases and they were frustrated that after ten years they had not made partner. They began meeting and discussing starting a litigation boutique firm offering big firm knowhow, in a small boutique firm package, at small firm prices. On January 2, 1990, they launched

their new firm, Bigger & Better. Paul and George formed a partnership with each having an equal interest. Compensation was based upon partnership interest and each partner shared equally in firm profits.

The firm was very successful at obtaining quality clients and began hiring additional lawyers. After eight years, the firm had a roster of top tier fortune 500 clients and five attorneys. Revenues and profits per partner were on par with large firms in Chicago. In 2004, the firm admitted Joanne Best as an equity partner with an equal interest. Joanne paid \$85,000 for her equity interest over

29 N.E.3d 1233

**Kathleen T. HAWKINS, Not in Her
Individual Capacity but as the Trustee of
the Kathleen T. Hawkins Trust, u/t/a
Dated December 12, 2002, Plaintiff–
Appellant**

v.

**Wayne VOSS, Mark Voss, and Tim Voss,
d/b/a Voss Brothers Action Auction
Associates, Defendants–Appellees.**

No. 5–14–0001.

Appellate Court of Illinois, Fifth District.

April 9, 2015.

[29 N.E.3d 1234]

Jay M. Huetsch, Adams & Huetsch, Waterloo, IL,
for Appellant.

Timothy A. Gutknecht, Stumpf & Gutknecht, P.C.,
Columbia, IL, for Appellees.

OPINION

Justice GOLDENHERSH delivered the judgment
of the court, with opinion.

¶ 1 This case concerns an auction of real estate.
Plaintiff, Kathleen T. Hawkins, entered

[29 N.E.3d 1235]

into an oral agreement with defendants, Wayne
Voss, Mark Voss, and Tim Voss, in which
defendants agreed to sell plaintiff's home and
provide the documents necessary to complete the
sale. Plaintiff's home was part of plaintiff's own
revocable trust to which she was the trustee. After
defendants procured successful buyers for
plaintiff's home, but before plaintiff conveyed her
home, the buyers reneged on the purchase.

¶ 2 Plaintiff brought suit against defendants,
Wayne Voss, Mark Voss, and Tim Voss, alleging
breach of contract, negligence, and breach of
fiduciary duty for defendants' failure to provide

plaintiff a disclosure form to give to the buyers of
plaintiff's home as required by the Residential
Real Property Disclosure Act (Act) (765 ILCS 77/1
et seq. (West 2010)). Defendants filed a motion
for judgment on the pleadings asserting that
plaintiff was acting as a fiduciary in the course of
the administration of a trust when she engaged in
the sale of her trust real estate, and was,
therefore, exempt from the disclosure form
requirement pursuant to an exemption in the Act
(765 ILCS 77/15 (West 2010)).

¶ 3 The trial court found that plaintiff was not
required to comply with the disclosure form
requirement, and, therefore, defendants' alleged
failure to provide the disclosure form was not a
breach of contract or fiduciary duty and not
negligence. Plaintiff filed a motion to reconsider,
which the trial court denied. Plaintiff then filed a
timely notice of appeal. We affirm.

¶ 4 BACKGROUND

¶ 5 Plaintiff, Kathleen T. Hawkins, established a
revocable trust in December 2002. Plaintiff was
named the grantor, trustee, and sole primary
beneficiary of the trust, and her children were
named as contingent beneficiaries. Plaintiff
transferred her home into the trust sometime in
2002.

¶ 6 Plaintiff alleges that on or about August 19,
2006, plaintiff entered into an oral agreement
with defendants, Wayne Voss, Mark Voss, and
Tim Voss, under which defendants agreed to
provide auction services to sell plaintiff's trust
real estate. Plaintiff further alleges that
defendants agreed to provide plaintiff with an
auction contract for the sale of the real estate
along with "other documents reasonably incident
thereto in order to effect the sale of such real
estate in the event [d]efendants procured a
successful bidder."

¶ 7 On August 19, 2006, defendants held an
auction and procured buyers for plaintiff's home.
Defendants then procured an auction contract for
purchase and sale of real estate between plaintiff
and the buyers, which provided for a closing date

of September 19, 2006. Prior to closing, the buyers reneged on the purchase of plaintiff's real estate after not having received a copy of the disclosure form as required by the Residential Real Property Disclosure Act (765 ILCS 77/1 *et seq.* (West 2010)).

¶ 8 Plaintiff subsequently filed suit against defendants, not in her individual capacity but as trustee of the Kathleen T. Hawkins Trust, u/t/a December 12, 2002. Plaintiff alleged the facts stated above and sued defendants for breach of contract, negligence, and breach of fiduciary duty for defendants' failure to provide plaintiff with the disclosure form to give the buyers. Plaintiff alleged the disclosure form should have been included in the documents defendants agreed to provide plaintiff in order to execute the sale of plaintiff's home.

¶ 9 Defendants responded and filed a motion for judgment on the pleadings asserting that section 15 of the Act exempts from the disclosure form requirement

[29 N.E.3d 1236]

“[t]ransfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust.” 765 ILCS 77/15(3) (West 2010). Defendants argued they had no duty to provide a disclosure form to plaintiff because the duty to provide the disclosure form does not apply to trustees acting as fiduciaries in the course of the administration of a trust, and, therefore, does not apply to plaintiff, who was selling her trust real estate as the trustee of her own trust. The trial court granted defendants' motion on all counts. Plaintiff then filed a motion to reconsider, which the trial court denied. Plaintiff timely appealed.

¶ 10 ANALYSIS

¶ 11 The single issue raised on appeal concerns whether defendants were required to provide a disclosure form for plaintiff to give the buyers as mandated by the Residential Real Property Disclosure Act (765 ILCS 77/1 *et seq.* (West

2010)). Plaintiff argues the trial court erred when it granted defendants' motion for judgment on the pleadings after finding defendants owed no statutory duty to provide plaintiff with a disclosure form by reason that plaintiff herself was not required to comply with the statute pursuant to an exemption in the Act. Defendants contend the trial court's judgment should be affirmed. For the following reasons, we agree with defendants and affirm.

¶ 12 Because this case turns on an issue of statutory construction, our review is *de novo*. *Carter v. Illinois Workers' Compensation Comm'n*, 2014 IL App (5th) 130151WC, ¶ 17, 381 Ill.Dec. 847, 11 N.E.3d 478. The primary rule of statutory construction is to ascertain and give effect to the legislature's intent. *Carter*, 2014 IL App (5th) 130151WC, ¶ 18, 381 Ill.Dec. 847, 11 N.E.3d 478. The language used in the statute is usually the best indicator of what the legislature intended. *Carter*, 2014 IL App (5th) 130151WC, ¶ 18, 381 Ill.Dec. 847, 11 N.E.3d 478.

¶ 13 Each undefined word in the statute must be given its common and popularly understood meaning. *Carter*, 2014 IL App (5th) 130151WC, ¶ 18, 381 Ill.Dec. 847, 11 N.E.3d 478. Words and phrases must be considered in light of other relevant provisions of the statute rather than viewed in isolation. *Carter*, 2014 IL App (5th) 130151WC, ¶ 18, 381 Ill.Dec. 847, 11 N.E.3d 478. If the statute's language leaves uncertainty as to how it should be interpreted, the court may look beyond the language employed and consider the purpose behind the law and the evils the law was designed to remedy. *Carter*, 2014 IL App (5th) 130151WC, ¶ 18, 381 Ill.Dec. 847, 11 N.E.3d 478. However, no aids for construction of language need be used where the statutory language is clear. *Carter*, 2014 IL App (5th) 130151WC, ¶ 18, 381 Ill.Dec. 847, 11 N.E.3d 478.

¶ 14 The instant case concerns the Residential Real Property Disclosure Act. The purpose of the disclosure form requirement of the Act is to provide prospective home buyers with information about material defects in the home that are known to the seller. *Bouton v. Bailie*,

2014 IL App (3d) 130406, ¶ 9, 386 Ill.Dec. 371, 20 N.E.3d 533. Section 20 of the Act provides:

“A seller of residential real property shall complete all applicable items in the disclosure document described in [s]ection 35 of this Act. The seller shall deliver to the prospective buyer the written disclosure statement required by this Act before the signing of a written agreement by the seller and prospective buyer that would, subject to the satisfaction of any negotiated contingencies, require

[29 N.E.3d 1237]

the prospective buyer to accept a transfer of the residential real property.” 765 ILCS 77/20 (West 2010).

¶ 15 Section 55 of the Act provides: “If the seller fails or refuses to provide the disclosure document prior to the conveyance of the residential real property, the buyer shall have the right to terminate the contract.” 765 ILCS 77/55 (West 2010). This is what happened in the instant case, as the buyers rescinded their contract with plaintiff prior to conveyance of the real estate after not receiving a disclosure form of the property.

¶ 16 Plaintiff and defendants disagree whether defendants were required to produce a disclosure form for plaintiff to give the buyers. For the following reasons, we find defendants were not required to provide a disclosure form.

¶ 17 The trial court found that plaintiff, as beneficiary of her own revocable trust, was a “seller” as defined by the Act, which plaintiff does not dispute. Section 5 of the Act defines “seller” as the following:

“ ‘Seller’ means every person or entity who is an owner, beneficiary of a trust, contract purchaser or

lessee of a ground lease, who has an interest (legal or equitable) in residential real property. However, ‘seller’ shall not include any person who has both (i) never occupied the residential real property and (ii) never had the management responsibility for the residential real property nor delegated such responsibility for the residential real property to another person or entity.” 765 ILCS 77/5 (West 2010).

¶ 18 While a seller is required to provide prospective buyers with a disclosure form pursuant to section 20 of the Act, section 15 of the Act provides nine exemptions from the disclosure form requirement, including an exemption for trustees acting as fiduciaries in the course of the administration of a trust. Defendants indicate this exemption to the disclosure form requirement applies to plaintiff, who was selling trust real estate as the trustee of her own revocable trust. We agree.

¶ 19 Section 15 provides:

“The provisions of this Act do not apply to the following:

* * *

(3) Transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust.” 765 ILCS 77/15 (West 2010).

¶ 20 In plaintiff's fifth amended complaint, plaintiff alleges she owned the real estate at issue not in her individual capacity but as trustee of the Kathleen T. Hawkins Trust, u/t/a December 12, 2002. As a trustee selling her own trust's real estate, plaintiff was not required to provide a disclosure form to the buyers of her real estate under the plain language of section 15 of the Act (765 ILCS 77/15 (West 2010)).

¶ 21 Plaintiff argues defendants had a statutory duty to provide plaintiff a disclosure form to give the buyers of plaintiff's home pursuant to section 20 of the Act based on the parties' agreement in which defendants agreed to provide plaintiff with documents necessary to complete the sale. However, plaintiff herself had no statutory duty to provide a disclosure form to the buyers. The plain language in section 15 of the Act carves out an exemption for trustees whereby trustees acting as fiduciaries in the course of the administration of a trust are not required to provide a disclosure form to prospective buyers. This is basic statutory construction. Accordingly, because plaintiff had no statutory duty to provide a disclosure form to the buyers, defendants had no statutory duty

[29 N.E.3d 1238]

or reason to provide a disclosure form to plaintiff.

¶ 22 Plaintiff raises several arguments on appeal, all of which attempt to circumvent the exemption to the disclosure form requirement provided in section 15 of the Act. We now address plaintiff's concerns.

¶ 23 I

¶ 24 The trial court's finding that plaintiff, as beneficiary of her revocable trust, was a "seller" as defined under section 5 of the Act does not preclude the exemption provided in section 15 of the same Act from applying to plaintiff.

¶ 25 Plaintiff alleges that because the trial court found she was a "seller" in her role as beneficiary of her trust, she was required pursuant to section 20 to "deliver to the prospective buyer the written disclosure statement required by this Act." 765 ILCS 77/20 (West 2010). Plaintiff also alleges that even if she is found to be a "fiduciary" under section 15 the Act, only the transfer by her as a fiduciary is exempt and not the entire transaction in her capacity as "seller."

¶ 26 While plaintiff accurately states that a seller is required to provide a disclosure form to prospective buyers, she does not consider the

exemption listed in section 15 of the Act that applies to transfers made by fiduciaries in the course of the administration of a trust. The fact that the trial court found plaintiff was a "seller" in her role as beneficiary of her trust does not change the fact that she was also the trustee of the trust when she was selling her trust real estate. Plaintiff attempts to differentiate between a transfer and transaction made in the instant case, but these are one and the same. Section 15 provides a clear exemption from the disclosure form requirement for these types of transfers.

¶ 27 II

¶ 28 Plaintiff was acting as a fiduciary in the course of the administration of trust real estate, and was, therefore, exempt from the disclosure form requirement of the Act.

¶ 29 Plaintiff concedes that the Act exempts certain transfers by a fiduciary. However, plaintiff claims she was not acting as a fiduciary when selling her trust real estate as the trustee of her own revocable trust, and, therefore, the fiduciary exemption in the Act should not apply. Plaintiff alleges she cannot serve as a fiduciary to herself because the existence of a fiduciary duty requires two separate people, and in the instant case plaintiff was the trustee and sole beneficiary of her trust. We disagree.

¶ 30 The plain language of section 15 exempts transfers by fiduciaries administering trusts from the disclosure form requirement. 765 ILCS 77/15 (West 2010). Plaintiff's attempt to separate the terms "fiduciary" and "trustee" fails, as a fiduciary in the course of the administration of a trust and a trustee in the course of the administration of a trust are directly related.

¶ 31 A fiduciary relationship exists between a trustee and beneficiary as a matter of law. *Janowiak v. Tiesi*, 402 Ill.App.3d 997, 1006, 342 Ill.Dec. 442, 932 N.E.2d 569, 579 (2010). "Trustees are but one example of a myriad of fiduciaries including guardians, executors, administrators, [and] agents * * *. [Citation.] Each of these fiduciaries owes a duty of loyalty to

the person or entity for whom the fiduciary is acting.” *Janowiak*, 402 Ill.App.3d at 1008, 342 Ill.Dec. 442, 932 N.E.2d at 581. A trustee “owes a fiduciary duty to a trust’s beneficiaries and is obligated to carry out the trust according to its terms and to act with the highest degrees of fidelity and utmost good faith.”

[29 N.E.3d 1239]

(Internal quotation marks omitted.) *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill.App.3d 605, 615, 309 Ill.Dec. 111, 863 N.E.2d 743, 754 (2007).

¶ 32 Illinois statutes have also defined the term “fiduciary” to include the role of trustee. The Fiduciary Transfer of Securities Act defines “fiduciary” as “an executor, administrator, trustee, guardian, committee, conservator, curator, tutor, custodian or nominee.” 760 ILCS 70/1(d) (West 2010). Similarly, the Fiduciary Obligations Act defines “fiduciary” as including “a trustee under any trust.” 760 ILCS 65/1(1) (West 2010). Finally, the Corporate Fiduciary Act also defines “fiduciary” as a trustee: “ ‘Fiduciary’ means trustee, executor, administrator, receiver, guardian, assignee for the benefit of creditors, or any holder of a similar position of trust.” 205 ILCS 620/1–5.12 (West 2010).

¶ 33 Illinois law has consistently held that trustees assume the role of a fiduciary. The fact that the trustee and beneficiary are the same person in the instant case does not erase the fiduciary role plaintiff assumes in acting as trustee in the course of administering the trust. Accordingly, plaintiff’s argument that she was acting as a trustee but not a fiduciary is incorrect, as she was acting in both the role as trustee and fiduciary.

¶ 34 Plaintiff makes several arguments in an attempt to support her position that the existence of a fiduciary duty between a trustee and beneficiary requires two separate people. First, plaintiff indicates the supreme court has held that “not all trusteeships are fiduciary in character.”

Englestein v. Mintz, 345 Ill. 48, 58, 177 N.E. 746, 751 (1931). The court in *Englestein* stated:

“While there are relations which from their nature imply duties and obligations and are fiduciary in their character, such as those of trustees and *cestuis que trustent* of an active trust, * * * not all trusteeships are fiduciary in character. [Citations.] A fiduciary relationship does not exist in case of a mere naked or dry trustee who has no duty to perform and stands in no relation of influence over the *cestui que trust* * * *.” *Englestein*, 345 Ill. at 58, 177 N.E. at 751.

¶ 35 *Englestein* is distinguishable from the instant case. The court in *Englestein* indicated that a fiduciary relationship does not exist in cases involving dry trustees. Black’s Law Dictionary defines a “dry trust” as a “trust that merely vests legal title in a trustee and does not require that trustee to do anything.” Black’s Law Dictionary 1548 (8th ed. 2004). The instant case does not involve a dry trust. Rather, plaintiff’s trust was an express trust that imposed duties and obligations on the trustee. Hence, the reasoning of the court in *Englestein* concerning a dry trust is inapplicable to the facts of the instant case.

¶ 36 Second, plaintiff cites Black’s Law Dictionary’s definitions of “fiduciary” to support her position that she cannot be a fiduciary for herself. Black’s Law Dictionary defines “fiduciary” as:

“1. A person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor * * *.
2. One who must exercise a high standard of care in managing another’s money or property * * *.” Black’s Law Dictionary 658 (8th ed. 2004).

¶ 37 Black's Law Dictionary defines "fiduciary relationship" as:

"A relationship in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship. Fiduciary relationships

[29 N.E.3d 1240]

—such as trustee-beneficiary * * *—require an unusually high degree of care." Black's Law Dictionary 1315 (8th ed. 2004).

¶ 38 Plaintiff argues these definitions indicate she could not owe fiduciary duty to herself since owing a fiduciary duty to another requires two separate persons, and here plaintiff was the solely vested beneficiary of the revocable trust to which she had the power to revoke at any time. However, plaintiff does not take into account that as trustee she also owes a fiduciary duty to the contingent remainders of her trust. Plaintiff's children are named as contingent beneficiaries to her trust and will become primary beneficiaries if plaintiff does not exhaust the assets of the trust during her lifetime.

¶ 39 The fact that plaintiff is the only beneficiary of the trust whose interest is vested does not eliminate the fiduciary duty she owes to the contingent beneficiaries of the trust, as vested and contingent beneficiaries are owed the same fiduciary duty: "A trustee owes the same fiduciary duty to a contingent beneficiary as to one with a vested interest in so far as necessary for the protection of the contingent beneficiary's rights in the trust property." (Internal quotation marks omitted.) *Giagnorio v. Emmett C. Torkelson Trust*, 292 Ill.App.3d 318, 323, 226 Ill.Dec. 693, 686 N.E.2d 42, 45 (1997).

¶ 40 As defendants indicate, contingent beneficiaries are treated as having vested interests subject to divestment rather than no interest. *Farkas v. Williams*, 5 Ill.2d 417, 431, 125 N.E.2d 600, 608 (1955). Thus, even if plaintiff cannot

owe a fiduciary duty to herself as the solely vested beneficiary of the trust as she suggests, plaintiff still owes a fiduciary duty to her children named as contingent beneficiaries. Furthermore, while it is true that plaintiff's trust is revocable, plaintiff has not yet exercised her right to revoke the trust, and, therefore, the rights of plaintiff's children as contingent beneficiaries must be protected by the fiduciary duty owed to them by plaintiff as trustee.

¶ 41 Plaintiff cites to *In re Marriage of Centioli*, 335 Ill.App.3d 650, 269 Ill.Dec. 814, 781 N.E.2d 611 (2002), in support of her contention that a contingent beneficiary has a mere expectancy interest rather than a vested interest. However, this case concerns expectancy interests of a beneficiary in a divorce proceeding under the Illinois Marriage and Dissolution of Marriage Act and does not discuss a trustee's fiduciary duty with respect to the Residential Real Property Disclosure Act.

¶ 42 Plaintiff also indicates this court has stated that a fiduciary relationship extends to every possible case "in which there is confidence reposed on one side and a resulting superiority and domination on the other." (Internal quotation marks omitted.) *Maguire v. Holcomb*, 169 Ill.App.3d 238, 242, 119 Ill.Dec. 932, 523 N.E.2d 688, 690 (1988). Plaintiff argues this statement implies that one cannot be a fiduciary for oneself. However, plaintiff omits the first part of that statement, which specifically indicates a trustee is a fiduciary:

"A fiduciary relationship is not limited to cases of trustee and *cestui que trust*, guardian and ward, attorney and client, and other recognized legal relationships, but extends to every possible case in which there is confidence reposed on one side and a resulting superiority and domination on the other." (Internal quotation marks omitted.) *Maguire*, 169 Ill.App.3d at 242, 119 Ill.Dec. 932, 523 N.E.2d at 690.

¶ 43 The court's statement that a "fiduciary relationship is not limited to cases of trustee" indicates that trustees are fiduciaries. As mentioned above, Illinois law has consistently held that trustees assume the

[29 N.E.3d 1241]

role of fiduciary and owe a fiduciary duty to both vested and contingent beneficiaries of the trust.

¶ 44 Plaintiff then argues plaintiff's revocable trust is an estate planning trust that should be interpreted under the law on wills. Plaintiff contends the contingent beneficiaries in plaintiff's revocable trust are no different from beneficiaries under a will, and, therefore, the contingent beneficiaries do not have vested interests that trigger a fiduciary duty. We disagree.

¶ 45 Plaintiff points out that courts have found it logical to apply the rules for construing wills to testamentary trusts that differ from wills in form but not in purpose or substance. *Handelsman v. Handelsman*, 366 Ill.App.3d 1122, 1129, 304 Ill.Dec. 406, 852 N.E.2d 862, 868 (2006). While plaintiff's reference to *Handelsman* is accurate, it does not apply here because there is no testamentary trust involved. Plaintiff is living and is the trustee of her own revocable trust. The law on wills does not apply to the instant case.

¶ 46 Lastly, plaintiff argues public policy considerations conclude that no fiduciary duty existed between plaintiff as trustee and plaintiff's children as contingent beneficiaries of the trust. We disagree.

¶ 47 Plaintiff questions whether contingent beneficiaries have standing to challenge the actions of a trustee of a revocable trust if they are owed a fiduciary duty from that trustee. However, it would be imprudent for a contingent beneficiary to challenge the actions of a trustee who has the power to revoke the trust at will and remove the challenging beneficiary from the trust. Accordingly, we give this concern no weight and reject plaintiff's public policy argument.

¶ 48 CONCLUSION

¶ 49 In sum, we find plaintiff had no statutory duty to provide a disclosure form to the buyers of plaintiff's home, and, therefore, defendants had no statutory duty to provide a disclosure form to plaintiff to give the buyers. For the reasons stated herein, we affirm the judgment of the circuit court of Monroe County, Illinois.

¶ 50 Affirmed.

Presiding Justice CATES and Justice CHAPMAN concurred in the judgment and opinion.



MULTI-BOARD RESIDENTIAL REAL ESTATE CONTRACT 7.0



1 **1. THE PARTIES:** Buyer and Seller are hereinafter referred to as the "Parties."

2 Buyer Name(s) [PLEASE PRINT] _____

3 Seller Name(s) [PLEASE PRINT] _____

4 **If Dual Agency applies, check here ☐ and complete Optional Paragraph 29.**

5 **2. THE REAL ESTATE:** Real Estate is defined as the property, all improvements, the fixtures and Personal Property
6 included therein. Seller agrees to convey to Buyer or to Buyer's designated grantee, the Real Estate with
7 approximate lot size or acreage of _____ commonly known as:

8 _____

9 Address _____ Unit # (If applicable) _____ City _____ State _____ Zip _____ County _____

10 Permanent Index Number(s): _____ ☐ Single Family Attached ☐ Single Family Detached ☐ Multi-Unit

11 **If Designated Parking is Included:** # of space(s) _____; identified as space(s) # _____; location _____

12 [CHECK TYPE] ☐ deeded space, PIN: _____ ☐ limited common element ☐ assigned space.

13 **If Designated Storage is Included:** # of space(s) _____; identified as space(s) # _____; location _____

14 [CHECK TYPE] ☐ deeded space, PIN: _____ ☐ limited common element ☐ assigned space.

15 **3. FIXTURES AND PERSONAL PROPERTY AT NO ADDED VALUE:** All of the fixtures and included Personal Property

16 are owned by Seller and to Seller's knowledge are in operating condition on Date of Acceptance, unless otherwise

17 stated herein. Seller agrees to transfer to Buyer all fixtures, all heating, electrical, plumbing, and well systems

18 together with the following items at no added value by Bill of Sale at Closing [CHECK OR ENUMERATE APPLICABLE ITEMS]:

19 ☐ Refrigerator	☐ Wine/Beverage Refrigerator	☐ Light Fixtures, as they exist	☐ Fireplace Gas Log(s)
20 ☐ Oven/Range/Stove	☐ Sump Pump(s)	☐ Built-in or attached shelving	☐ Smoke Detectors
21 ☐ Microwave	☐ Water Softener (unless rented)	☐ All Window Treatments & Hardware	☐ Carbon Monoxide Detectors
22 ☐ Dishwasher	☐ Central Air Conditioning	☐ Satellite Dish	☐ Invisible Fence System, Collar & Box
23 ☐ Garbage Disposal	☐ Central Humidifier	☐ Wall Mounted Brackets (AV/TV)	☐ Garage Door Opener(s)
24 ☐ Trash Compactor	☐ Central Vac & Equipment	☐ Security System(s) (unless rented)	☐ with all Transmitters
25 ☐ Washer	☐ All Tacked Down Carpeting	☐ Intercom System	☐ Outdoor Shed
26 ☐ Dryer	☐ Existing Storms & Screens	☐ Electronic or Media Air Filter(s)	☐ Outdoor Playset(s)
27 ☐ Attached Gas Grill	☐ Window Air Conditioner(s)	☐ Backup Generator System	☐ Planted Vegetation
28 ☐ Water Heater	☐ Ceiling Fan(s)	☐ Fireplace Screens/Doors/Grates	☐ Hardscape

29 **Other Items Included at No Added Value:** _____

30 **Items Not Included:** _____

31 **Seller warrants to Buyer that all fixtures, systems and Personal Property included in this Contract shall be in**

32 **operating condition at Possession except:** _____

33 A system or item shall be deemed to be in operating condition if it performs the function for which it is intended,
34 regardless of age, and does not constitute a threat to health or safety.

35 **If Home Warranty applies, check here ☐ and complete Optional Paragraph 32.**

36 **4. PURCHASE PRICE AND PAYMENT:** The Purchase Price is \$ _____. After the payment of Earnest

37 Money as provided below, the balance of the Purchase Price, as adjusted by prorations, shall be paid at Closing in

38 "Good Funds" as defined by law.

39 a) **CREDIT AT CLOSING:** [IF APPLICABLE] Provided Buyer's lender permits such credit to show on the final
40 settlement statement or lender's closing disclosure, and if not, such lesser amount as the lender permits, Seller
41 agrees to credit \$ _____ to Buyer at Closing to be applied to prepaid expenses, closing costs or both.

42 b) **EARNEST MONEY:** Earnest Money of \$ _____ shall be tendered to Escrowee on or before ____
43 Business Days after Date of Acceptance. Additional Earnest Money, if any, of \$ _____ shall be tendered
44 by _____, 20 _____. Earnest Money shall be held in trust for the mutual benefit of the Parties by

Buyer Initial _____ Buyer Initial _____

Seller Initial _____ Seller Initial _____

Address: _____ 6 - 22 _____ v7.0

264 to the current Minimum Standard of Practice for boundary surveys, is dated not more than six (6) months prior to
265 the date of Closing, and is prepared by a professional land surveyor licensed to practice land surveying under the
266 laws of the State of Illinois. The Plat of Survey shall show visible evidence of improvements, rights of way,
267 easements, use and measurements of all parcel lines. The land surveyor shall set monuments or witness corners at
268 all accessible corners of the land. **All such corners shall also be visibly staked or flagged.** The Plat of Survey shall
269 include the following statement placed near the professional land surveyor's seal and signature: "This professional
270 service conforms to the current Illinois Minimum Standards for a boundary survey." A Mortgage Inspection, as
271 defined, is not a boundary survey and is not acceptable.

272 **20. DAMAGE TO REAL ESTATE OR CONDEMNATION PRIOR TO CLOSING:** If prior to delivery of the deed the Real
273 Estate shall be destroyed or materially damaged by fire or other casualty, or the Real Estate is taken by
274 condemnation, then Buyer shall have the option of either terminating this Contract (and receiving a refund of
275 Earnest Money) or accepting the Real Estate as damaged or destroyed, together with the proceeds of the
276 condemnation award or any insurance payable as a result of the destruction or damage, which gross proceeds
277 Seller agrees to assign to Buyer and deliver to Buyer at Closing. Seller shall not be obligated to repair or replace
278 damaged improvements. The provisions of the Uniform Vendor and Purchaser Risk Act of the State of Illinois shall
279 be applicable to this Contract, except as modified by this paragraph.

280 **21. CONDITION OF REAL ESTATE AND INSPECTION:** Seller agrees to leave the Real Estate in broom clean condition.
281 All refuse and personal property that is not to be conveyed to Buyer shall be removed from the Real Estate at
282 Seller's expense prior to delivery of Possession. Buyer shall have the right to inspect the Real Estate, fixtures and
283 included Personal Property prior to Possession to verify that the Real Estate, improvements and included Personal
284 Property are in substantially the same condition as of Date of Acceptance, normal wear and tear excepted.

285 **22. SELLER REPRESENTATIONS:** Seller's representations contained in this paragraph shall survive the Closing.
286 Seller represents that with respect to the Real Estate, Seller has no knowledge of, nor has Seller received any written
287 notice from any association or governmental entity regarding:

- 288 a) zoning, building, fire or health code violations that have not been corrected;
289 b) any pending rezoning;
290 c) boundary line disputes;
291 d) any pending condemnation or Eminent Domain proceeding;
292 e) easements or claims of easements not shown on the public records;
293 f) any hazardous waste on the Real Estate;
294 g) real estate tax exemption(s) to which Seller is not lawfully entitled; or
295 h) any improvements to the Real Estate for which the required initial and final permits were not obtained.

296 Seller further represents that:

297 [INITIALS] _____ There [CHECK ONE] ☐ are ☐ are not improvements to the Real Estate which are not
298 included in full in the determination of the most recent tax assessment.

299 [INITIALS] _____ There [CHECK ONE] ☐ are ☐ are not improvements to the Real Estate which are eligible
300 for the home improvement tax exemption.

301 [INITIALS] _____ There [CHECK ONE] ☐ is ☐ is not an unconfirmed pending special assessment affecting
302 the Real Estate by any association or governmental entity payable by Buyer after the date of Closing.

303 [INITIALS] _____ The Real Estate [CHECK ONE] ☐ is ☐ is not located within a Special Assessment Area or
304 Special Service Area, payments for which will not be the obligation of Seller after the year in which the Closing occurs.
305 All Seller representations shall be deemed re-made as of Closing. If prior to Closing Seller becomes aware of
306 matters that require modification of the representations previously made in this Paragraph 22, Seller shall

Buyer Initial _____ Buyer Initial _____

Seller Initial _____ Seller Initial _____

Address: _____ 6 - 23 _____ v7.0

Information maintained by the Legislative Reference Bureau

Updating the database of the Illinois Compiled Statutes (ILCS) is an ongoing process. Recent laws may not yet be included in the ILCS database, but they are found on this site as [Public Acts](#) soon after they become law. For information concerning the relationship between statutes and Public Acts, refer to the [Guide](#).

Because the statute database is maintained primarily for legislative drafting purposes, statutory changes are sometimes included in the statute database before they take effect. If the source note at the end of a Section of the statutes includes a Public Act that has not yet taken effect, the version of the law that is currently in effect may have already been removed from the database and you should refer to that Public Act to see the changes made to the current law.

PROPERTY
(765 ILCS 65/) Uniform Vendor and Purchaser Risk Act.

(765 ILCS 65/1) (from Ch. 29, par. 8.1)

Sec. 1. Any contract hereafter made for the purchase and sale of real property in this State shall be interpreted as including an agreement that the parties shall have the following rights and duties, unless the contract expressly provides otherwise:

(a) If, when neither the legal title nor the possession of the subject matter of the contract has been transferred, all or a material part thereof is destroyed without fault of the purchaser or is taken by eminent domain, the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid;

(b) If, when either the legal title or the possession of the subject matter of the contract has been transferred, all or any part thereof is destroyed without fault of the vendor or is taken by eminent domain, the purchaser is not thereby relieved from a duty to pay the price, nor is he entitled to recover any portion thereof that he has paid; provided, however, if the purchase and sale of real property is to be consummated by means of an escrow, title shall not be considered to have been transferred for purposes of this act, despite the delivery and recordation of a deed to such real property, unless the conditions of the escrow relating to the passing of the full legal and equitable title shall have been fulfilled.

(Source: Laws 1963, p. 2099.)

(765 ILCS 65/2) (from Ch. 29, par. 8.2)

Sec. 2. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(Source: Laws 1963, p. 2099.)

(765 ILCS 65/3) (from Ch. 29, par. 8.3)

Sec. 3. This act may be cited as the Uniform Vendor and Purchaser Risk Act.

(Source: Laws 1963, p. 2099.)



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